Supreme Court, U.S.
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No. 04-778

IN THE

Supreme Court of the United States

PAN AMERICAN ENERGY, LLC,

Petitioner,

v.

CANDLEWOOD TIMBER GROUP, LLC
and FORESTAL SANTA BARBARA SRL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court posses jurisdiction when (a) the petition fails to show that any federal question was raised in or passed upon by the state courts; and (b) contrary to the mandate of 28 U.S.C. § 1257, there is no final judgment?

2. In an ordinary common law action seeking money damages for breach of contract and tort by a Delaware plaintiff against a Delaware defendant that stemmed from injury to land and chattels located in a foreign country and plaintiff's business in the United States, did the Delaware Supreme Court err in not finding some state court subject matter jurisdiction limitation simply because defendant's business operations are also subject to certain foreign regulatory controls?

RULE 29.6 STATEMENT

Respondent Forestal Santa Barbara SRL is a wholly owned subsidiary of Candlewood Timber Group, LLC. There is no parent or other publicly held corporation that owns more than 10% of Candlewood's stock.

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COUNTERSTATEMENT OF THE FACTS

Since the petition scarcely makes any contact with the case actually presented to, or decided by, the court below, a brief counterstatement of the relevant facts is necessary. We, therefore, focus directly upon the decision of the Delaware Supreme Court. (App. 1a-32a).

FACTS. The Delaware Supreme Court opinion begins with a description of the controversy before it: a common law contract and tort dispute against a Delaware business entity resulting from injury caused by defendant's drilling operations. Together with its wholly owned subsidiary, plaintiff Candlewood, also a Delaware business entity, engages in the business of "sell[ing] wood products derived from South American forests that are managed consistently with international standards of sustainable forestry." Defendant (petitioner here) "engages in oil and gas extraction, [and] is the second largest hydrocarbon producer in Argentina." (App. 2a). Defendant holds "concessionary rights [granted] by the Argentine Republic (which owns all the oil and gas rights in Argentina) to extract oil and gas in [the Argentinian Province of] Salta," a concession that covers plaintiff's land. (App. 2a). Defendant sought permission to extract oil and gas from plaintiff's land; agreements were executed to that effect (App. 2a); and plaintiff alleges that defendant's drilling program caused "damages to trees, use of earth, and interference with the plaintiff's sustainable forestry business." (App. 28a n.50).

On January 28, 2003, plaintiff (and its wholly owned and controlled Argentinian subsidiary, app. 2a) filed suit in the Delaware Court of Chancery seeking both monetary and injunctive relief. Defendant's first response was to file a

counter-suit in the Supreme Court of Argentina alleging that jurisdiction over the dispute was exclusively in the Argentinian courts and that the simple existence "of the Delaware action and the threat of restraining orders" threatened vital Argentinian interests. Defendant "sought to join the Nation of Argentina and the Province of Salta as third parties so as to create original jurisdiction in the Argentine Supreme Court." (App. 3a).

Plaintiff thereupon filed a second amended complaint "that dropped all requests for injunctive relief, including relief that would require supervision of [defendant's] conduct on [plaintiff's] land in Argentina." (App. 3a-4a). The new complaint now simply alleged claims for money damages based upon various common law causes of action in contract and tort (App. 4a). On June 23, 2003, defendant filed a second action in an Argentine provincial court seeking to condemn plaintiff's land. (App. 4a) Argentina also filed a pleading in the Argentine Supreme Court, claiming that the "permanent injunctions being sought [in Delaware] put the basic institutions of the Nation [at] risk." (App. 5a). As the Delaware Supreme Court observed, this intervention was the result of defendant's "access to the highest levels of the Argentine government to influence both this litigation and [defendant's] second-filed action in Argentina." (App. 5a n.4). The government's pleading showed that the government was wholly unaware that plaintiff "was seeking only damages based upon common law claims arising out of private contracts," or that plaintiff had previously so informed both the Delaware Court of Chancery and the defendant. (App. 5a). In fact, the pleading made no reference whatsoever to the then existing second amended complaint in the Delaware court.

HOLDINGS. The Delaware Chancery Court dismissed the complaint on two state law bases: first, want of subject matter jurisdiction under state law, because the second amended complaint alleged no equitable causes of action; and second, the Delaware law of *forum non conveniens*. On appeal, petitioner presented no federal question of any kind to the Delaware Supreme Court. The solitary federal citation in its brief is a "see also" reference to *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947). Nor did defendant even cite the Restatement of Foreign Relations. In an opinion by Justice Jacobs, the Delaware Supreme Court affirmed in part and reversed in part:

- The Delaware Court of Chancery correctly held that it lacked subject matter jurisdiction because no equitable claims were presented. The case, accordingly, should be transferred to the Delaware Superior Court. Quite clearly, the allocation of subject matter jurisdiction within the Delaware judicial system presents no issue of federal cognizance, and the petition does not suggest otherwise.

- Turning to the issue of *forum non conveniens*, the Delaware Supreme Court reversed, stating that "its jurisprudence was clear and required proof of 'overwhelming hardship' from litigating a first-filed case in Delaware." (App. 16a). The court then considered the six "*Cryo-Maid*" factors,[1] which it said the Court of Chancery had correctly identified, but had misapplied. (App. 19a-25a). The petition, of

1. Referring to the factors set out *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1984) (Factors to be considered in *forum non conveniens* analysis).

course, does not, and could not, challenge the Delaware Supreme Court's ruling on the application of its own law. Rather, the petition's entire focus (pet. 14) is on a single point: the state court's alleged exclusion from its *forum non conveniens* analysis of any claim that "Argentina has a far greater interest in the controversy than does Delaware." (App. 16a).

- The third holding of the Delaware Supreme Court is one which (given its "exclusion" argument) petitioner assiduously seeks to obscure. (App. 25a-32a). Noting that "the real driver" of the Court of Chancery opinion was "the possibility that the Argentine courts have exclusive jurisdiction over the subject matter of the Delaware action," *id.* at 25a, the Delaware Supreme Court, addressed that issue separately rather than as one factor in its general *forum non conveniens* analysis. (App. 25a). This, we emphasize, is the very issue we are told over and over again by petitioner that the Delaware Supreme Court ignored! Suffice it at this point (*see* Point IIB, *infra)* to observe that the Delaware Supreme Court held that defendant had not established its claim of exclusive jurisdiction in the Argentine courts, but if it had, the Delaware Supreme Court would have given it the most careful respect under its "*Taylor*" holding.[2] Defendant not only did not meet its affirmative burden in demonstrating that Argentinian courts would have asserted exclusive jurisdiction, but well-recognized authorities such as

2. The court (App. 30a-31a) referred to its decision in *Taylor v. LSI Logic Corp.*, 715 A.2d 937, 842 (Del. 1988), discussing the Delaware courts' receptivity, as a matter of Delaware substantive law, to claims that foreign law localized the jurisdiction in foreign tribunals.

> Professor J.W. Moore's treatise, and the declaration by Professor Arthur von Mehren of Harvard Law School, demonstrated that the common law contract and tort claims asserted are transitory, not local, in nature. (App. 29a). Accordingly, under standard choice of law principles, these claims could be asserted in any court with personal jurisdiction over the litigants. And earlier in its opinion, the court stressed that Delaware has "a significant . . . interest in the lawsuit which is to make available to litigants a neutral forum to adjudicate commercial disputes against Delaware entities, even where the dispute involves foreign law and the parties and conduct are centered in a foreign jurisdiction." (App. 18a).

The Delaware Supreme Court decided no federal question because no such issue was submitted to it for decision.

REASONS FOR DENYING THE PETITION

This petition should be denied for at least a half dozen, independently dispositive, reasons. First, it seeks to persuade the Court to hear a case for the purpose of applying an asserted rule of federal foreign relations law that was never raised in, let alone considered by, the courts below. Second, there is no final judgment. Third, the petition seeks to persuade the Court to apply an asserted federal rule of foreign relations law that has never been considered, let alone applied, by any other court in the United States. Fourth, the petition is based on the factually incorrect assertion that the courts below did not give any consideration to the interests of Argentina, when they plainly did do so. Fifth, it asserts the applicability of an asserted rule of federal foreign relations law without remotely specifying the content of the proposed

rule. And sixth, there is no federal rule of foreign relations law that specifies what consideration a state court, in denying a *forum non conveniens* motion, must give to the interests of a foreign state that is neither an actual party, nor an indispensable party, to the action.

POINT I. THIS COURT HAS NO JURISDICTION

A. The Federal Question Presented For Review Was Not Presented Or Passed On Below.

Petitioner's Question Presented does not identify any federal question with anything approaching clarity.[3] *See* Point IIA, *infra.* In the section entitled Provisions of Federal Law Involved (pet. 1) we are told that "[t]his case involves principles of the federal common law of foreign relations." What we are not told, however, is where petitioner presented any issue of federal law for adjudication by the state courts, of where they passed upon such issues.

This Court's Rule 14.1(g)(i) requires that a petition for a writ of certiorari must set out with specificity when, how, and where the federal question sought to be reviewed was raised in the state court.[4] The petition makes no effort – none

3. "Whether a state court may wholly disregard foreign sovereign interests in deciding whether to exercise jurisdiction over a foreign dispute."

4. Sup. Ct. Rule 14.1(g)(i) provides:

> If review of a state-court judgment is sought, specification of the stage in the proceedings both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the

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whatsoever – to comply with this rule. The petition does not specify when, where, or in what manner, defendant raised in the state proceedings the federal question sought to be reviewed. The issues raised in the Court of Chancery proceeding and on appeal before the Delaware Supreme Court were all framed solely in terms of Delaware law. The Delaware courts were never told that they were required to apply federal law. For that reason, neither the Court of Chancery nor the Delaware Supreme Court opinions make any reference to a federal common law of foreign relations. Here, we note, defendant has failed to explicitly raise below not some federal question which could be claimed to be obvious on the face of the complaint, or elsewhere in the record, but a federal common law outside the established doctrine of state action, as to the scope of which this Court has expressed serious reservations (*see* p. 11 n.6), as to which defendant cites no state case in which there is even a reference to the doctrine, and as to which the Delaware courts were not alerted by any Argentine governmental expressions of interest because these were all predicated upon an earlier, and quite different, version of the Delaware complaint.

(Cont'd)

> method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on the writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

The jurisdictional nature of petitioner's failure to present its federal claims to the state court needs no extended elaboration. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time. In *Cromwell v. Rendell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases . . . and came to the conclusion that the Judiciary Act of 1789, c. 20, 25, vested this Court with no jurisdiction unless a federal question was raised and decided below . . . This Court has consistently refused to decide federal constitutional issues raised here for the first time on a review of state court decisions both before the Cromwell opinion . . . and since . . ." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See also* 28 U.S.C. § 1257, which requires that the federal question have been "drawn in question" or "specially set up and claimed." *See also*, for example, *Webb v. Webb*, 451 U.S. 493, 498-99 (1981) (stressing the importance of the requirement that federal claims be presented to the state courts).[5]

Petitioner's failure to make any effort to comply with Rule 14.1(g)(i) speaks volumes: To repeat, the Delaware courts were never told that they must apply federal law.

B. There Is No Final Judgment.

Ever since the Judiciary Act of 1789, Supreme Court review of state courts has been limited to "final judgments or decrees" in order to minimize unwarranted intrusions upon

5. "Oblique" references to federal law will not do. "The vague appeal to constitutional principles does not preserve appellant's [constitutional] claims." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). "[A]t a minimum there should be no doubt from the record" where the federal claim was raised. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

state sovereignty. 1 Stat. 73, 85 ("final judgment or decree.") That restriction is carried forward in 28 U.S.C. § 1257. ("Final judgments or decrees.") Seeking to avoid the consequences of this obvious bar to jurisdiction, petitioner (pet. 11-12) invokes the standard refuge of litigants: the fourth exception described in *Cox v. Louisiana*, 420 U.S. 469, 482-83 (1975).

Petitioner argues that the judgment falls "squarely" within the fourth *Cox* exception, but in fact it clearly fails to meet several of its requirements. First, *Cox* requires that the "federal issue has been finally decided in the state court," *id.* at 482, but here, as discussed above, it was neither raised nor decided. Second, and importantly, *Cox* requires that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant causes of action," rather than merely affecting the structure of future proceedings. (*Id.* at 482-83). That condition cannot be satisfied here. Were this Court to fashion a new federal rule of *forum non conveniens* that states must follow, the rule could "take a number of [other] paths" that would not "preclude further proceedings in the state courts." *Nike v. Kasky*, 539 U.S. 654, 660 (2003). (Stevens, J. concurring). Most likely, for example, the Court would simply remand the matter to the Delaware Supreme Court for further proceedings in accordance with the new federal rule. And surely, continuance of the Delaware action can hardly "seriously erode foreign policy." 420 U.S. at 483 Defendant, it shall be noted, is not the government of Argentina. And because this is a suit for money damages, no Delaware court will order anyone in Argentina to do anything or supervise activities performed there.

The final judgment rule serves important federalism concerns. *Webb v. Webb*, *supra*, 451 U.S. at 499. It is not to be undercut by loose construction. In *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988), this Court construed the collateral order doctrine with respect to 28 U.S.C. § 1291, which governs appeals from "final decisions" of the district courts. It held that a denial of a plea of *forum non conveniens* was not appealable. Petitioner seeks to distinguish this quite dispositive holding in a footnote (pet. 12 n.1) with the unexplained assertion that § 1257 finality is not limited by the collateral order doctrine. This gets matters backwards. The tradition has been to cite precedents from the two statutes interchangeably, *see Cox*, 420 U.S. at 478 n.7; moreover, any difference between the two statutes would cut in favor of a stricter approach to the finality requirement in cases under § 1257. *See Cox*, 420 U.S. at 502-03 (Rehnquist, C.J., dissenting).

POINT II. THE CLAIM RAISED IS MERITLESS, AND IS NOT PRESENTED ON THE RECORD

Petitioner's Question Presented is, "Whether a state may wholly disregard foreign sovereign interests in deciding whether to exercise jurisdiction over a foreign dispute." (Pet. i) This we are told "involves principles of the federal common law of foreign relations (Pet. 1), on which (in a newly minted argument) there is now a "mature division in the lower courts." (Pet. 19).

A. The Issue Raised Is Meritless. The petition presents, not a question, but an invitation for a law review essay. Petitioner invites this Court to tell state courts they "must consider" and give "proper deference" to foreign relations issues while exercising *forum non conveniens* discretion, but is entirely silent on the content of the federal rule to be administered. (Pet. 13) What are the relevant variables? How much "consideration"

must be given to foreign sovereign interests: a little? a lot? Is a state court's statement that it had considered those interests sufficient? Is the suggestion that "the federal common law of foreign relations" somehow federalizes choice of law rules thereby overriding, in whole or part, the Rules of Decision Act, 28 U.S.C. § 1652, as applied in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)?[6] How does an ordinary commercial dispute involving a claim for money damages jeopardize United States foreign affairs interests? And how does any federal common law governing *forum non conveniens* affect subject matter jurisdiction rather than choice of law?

Petitioner's effort to bar Delaware jurisdiction here is breathtaking. It wholly ignores the vital interests that Delaware has in providing fair and efficient forums to decide claims against Delaware business entities. Delaware is the state of incorporation for many major United States corporations, and also for many companies operating principally abroad, including defendant. Companies locate in Delaware to take advantage of Delaware's corporate law reputation, including Delaware courts' reputation for fairness and efficiency in adjudicating commercial disputes. Maintaining Delaware's unparalleled corporate law status is among the state's vital interests. Firms conducting business in foreign places, such as respondents – a Delaware business entity, and its wholly-owned subsidiary – transact business with other Delaware companies on conditions and with a flexibility they

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6. Any displacement of state law by way of a judge made federal common law of foreign relations is exceedingly rare. *See Barclay's Bank, PLC v. Franchise Tax Bd.*, 521 U.S. 298, 327-28 (1983) and *W.S. Kirkpatrick & Co. v. Environmental Factories Corp. International* 493 U.S. 400 (1990), neither of which is even mentioned by petitioner, let alone discussed, but both of which rejected displacement claims based upon claims that the state law interfered with foreign affairs.

might otherwise decline to risk, because they know that, if they believe themselves injured, they can sue in Delaware's courts and get an impartial hearing. This readiness to hear disputes redounds to the benefit of all Delaware corporations, and it increases the state's attractiveness as a provider of corporation related services. Delaware is surely allowed to believe this, and its Supreme Court announced Delaware's "significant interest [in making] available to litigants a neutral forum to adjudicate commercial disputes against Delaware entities" in this very case. (App. 18a) *See* William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law 351 (1992).

B. The Question Presented Is Not Raised by the Record. We see no need to further multiply the difficulties inherent in petitioner's ill-conceived Question Presented. Nor need we explore here the allegedly "mature" conflict now pending in the lower courts, because it is not remotely implicated by this record. The Delaware Supreme Court did not "wholly disregard . . . foreign sovereign interests." (Pet. 3) Far from it. The court gave elaborate consideration to those interests. (App. 25a-32a).

The Delaware Supreme Court carefully analyzed the works of recognized treatise writers and the expert testimony before it, including that of Professor von Mehren and several Argentinian authorities. On that basis it decided that (a) Delaware courts could apply Argentina law, if necessary; (b) neither Argentina nor any instrumentality thereof was a necessary party, or otherwise bound by a Delaware judgment for money damages; (c) Argentina's law does not vest exclusive jurisdiction over this suit in Argentine courts, and, in any event, a simple contract and tort suit for damage to property could not be so "localized;" and (d) the declarations of Argentine interests that defendant procured and itself communicated to the court

showed, on their face, that the declarants did not understand the current posture of this lawsuit. (App. 25a-32a). What approach could be more sensitive to foreign sovereign interests?

The petition does not challenge any of these subsidiary holdings, ones that constitute the foundation for the Delaware court's decision. Nor could it because these are not reviewable federal questions. Petitioner received from the state court the very review it seeks here. This Court is asked to fashion a new limit on state power, and then say to the Delaware Supreme Court that it must do by one name, what it has already done by another. This bizarre contention ignores that the Court's jurisdiction exists "to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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